Supreme Court, U.S.
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No. 00-201

In the

Supreme Court of the United States

THE NEW YORK TIMES COMPANY, INC; NEWSDAY, INC.; THE TIME INCORPORATED MAGAZINE COMPANY; LEXIS/NEXIS and UNIVERSITY MICROFILMS INTERNATIONAL,

Petitioners,

vs.

JONATHAN TASINI; MARY KAY BLAKELY; BARBARA GARSON; MARGOT MIFFLIN; SONIA JAFFE ROBBINS and DAVID S. WHITFORD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

EMILY MARUJA BASS, ESQ.
Counsel of Record for Respondents Barbara Garson and Sonia Jaffe Robbins
GAYNOR & BASS
535 Fifth Avenue, 23rd Floor
New York, New York 10017
(212) 953-4300

Also on the Brief:
LINDA A. BACKIEL
MICHAEL J. GAYNOR
JOANNA KYD

3600

QUESTIONS PRESENTED

Were the Court to grant certiorari in this matter, the case would present three questions:

1. Whether the privilege afforded newspaper and magazine publishers in § 201(c) to enable them to construct their "collective works" thereafter affords anyone — and, if so, who — the privilege of *de*constructing those collective works and individually exploiting their freelance components?

2. Whether it affords anyone the privilege of taking a contribution that originally appeared as part of *one* publication and reproducing it and making it available either as a standalone unit or in combination with articles from other publications or periodical issues?

3. Whether an electronic database that contains millions or billions of articles from tens of thousands of different publications or from different issues of a publication constitutes a "revision" within the meaning of § 201(c) of each of the periodical issues from which an article or articles have been taken?

At this juncture in the case, there is only one question presented:

Whether it is appropriate for this Court to review, prior to entry of judgment and a hearing or determination on damages, a case of first impression resolved by a routine exercise in statutory construction?

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STATUTORY PROVISIONS INVOLVED

Petitioners do not quote either of the two sections of the Copyright Act that are at the heart of this case — §§ 201(c) and 103(b) — in the body of their brief.[1] Section 201(c) is found at page 114a of their Appendix.[2] Section 103(b) is ignored altogether.

Section 201(c) reads as follows:

§ 201. Ownership of Copyright

(c) Contributions to collective works. Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.[3]

* * *

The term "collective work" is elsewhere defined as meaning "a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." (115a-116a).

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1 This opposition is submitted on behalf of respondents Garson and Robbins. Other respondents are submitting a separate brief through their counsel, Patricia A. Felch, Esq. The original Opinion was issued on September 24, 1999; the Opinion was amended on February 25, 2000; and petitioners' request for rehearing with a suggestion of rehearing en banc was denied on April 6, 2000.

2 References to pages of petitioners' Appendices will be indicated (__a).

3 Petitioners invoked the "second" or middle of the three branches of the § 201(c) privilege.

Section 103(b) is quoted in the Second Circuit Opinion at 8a.

STATEMENT OF THE CASE

In an effort to make it appear as though this case presents issues on which there is a conflict of authority, defendants have misrepresented the facts of the case, respondents' positions in the case, and the findings of the two courts below.[4]

The relevant facts may be summarized as follows:

1. There were two sets of defendants in the case: the print-publisher defendants and database defendants. The print publisher-defendants included The New York Times, Newsday and Time Inc. The database defendants included LEXIS-NEXIS and University Microfilms Inc. (or the UMI Company). None of the defendants is a manufacturer or retailer of computers or any other staple article of commerce.

2. Plaintiffs were six freelance authors who contributed articles to one or more of the print publishers' publications.

3. Plaintiffs claimed that defendants infringed their copyrights by taking articles that they had written for inclusion in issues of two newspapers and one magazine[5] and, without their permission, incorporating them into one or another of three databases. The databases included the NEXIS on-line database (hereinafter referred to as "NEXIS") and two UMI CD-ROM's (hereinafter referred to as the "New York Times OnDisc" CD-ROM or "NYTO," and "General Periodicals On-Disc" CD-ROM or "GPO"). The articles that are the subject of

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4 For example, petitioners have asserted repeatedly throughout their brief that the District Court found as a matter of fact that the databases actually contained intact "electronic copies" of their collective works. The District Court did not so find. In the case of the NEXIS and NYTO databases, it found the opposite. (See, e.g., 102a: ". . . NEXIS and "The New York Times OnDisc," . . . are text based systems which store and display articles individually.") It then went on to conclude, however — as a matter of law — that the databases nonetheless *constituted* "revisions" of the print publishers' collective works. See para. # 5, *post*.

5 *The New York Times, Newsday* and *Sports Illustrated*.

the petition were not written pursuant to an express agreement regarding rights.

4. Plaintiffs claimed the print publishers and databases producers committed separate infringing acts. They did not claim defendants were vicariously liable for the infringing acts of third parties who accessed the defendants' databases.

The principal acts on which plaintiffs predicated their claims consisted of the following: In the case of the database producers, plaintiffs claimed that they improperly reproduced plaintiffs' articles both before and after adding them to their databases. In the case of the print publishers, plaintiffs claimed that they engaged in a series of acts that contributed to and made them vicariously liable for *the database defendants'* infringements.[6] These acts included the reproduction and provision of plaintiffs' works to the database producers,[7] as well as acts the print publishers undertook to prepare the articles for addition to the databases.[8]

5. Although petitioners repeatedly urged it to do so, the District Court did not find that the database defendants had

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6 District Court correctly noted that plaintiffs claimed contributory infringement *only* to the extent that they contributed to one another's infringement. Plaintiffs did not accuse end-users of infringing acts or attempt to make defendants vicariously liable for such acts. (33a, n.3).

7 In order to provide articles to the databases, the print publishers deconstruct their collective works. They then "discard" photographs, captions, graphics, maps, death notices, stock-market reports, crossword puzzles, public notices and advertisements (29a, 72a), leaving the "resaleable parts" of their collective works — individual articles— for recycling.

8 In order to prepare an article for electronic recycling, the publishers would: (1) ensure that each article that had once been part of a collective work was now in a separate electronic file (4a; 64a); (2) select keywords to reflect the content of each article and electronically assign them to that file (30a, 64a); (3) add basic information to each file to identify the author, name and date of the publication in which an article had originally appeared (4a, 29a, 64a); and (4) assign a unique "accession number" to each file to facilitate its independent retrieval. The publisher would then send these individually tagged and numbered files onto the database producers for further processing and addition to their databases.

placed intact "electronic copies" of the print publishers' collective works into the NEXIS on-line database or onto the NYTO CD-ROM. To the contrary, it found that articles that had once appeared together in a fixed relation as part of a particular collective work were no longer in that relation, but dispersed throughout the databases. (64a) As a consequence, it found that both NEXIS and the NYTO store and display individual articles, not collective works. (102a).

Notwithstanding these findings, it went on to find *as a matter of law* that each of the databases constituted a "revision" within the meaning of Section 201(c) of each individual issue of the print publishers' collective works in which a contribution first appeared.[9] It did so on the following two grounds:

i) because an article retrieved from one of the databases is displayed together with a citation to the periodical issue in which the article originally appeared (71a, 96a, 100a); and

ii) because, even though articles that originally appeared together are no longer grouped as a unit, the Court found that the other articles that had once appeared together with the article that is retrieved are present somewhere in the database. (70a, 96a, 98a, 99a n.7, 100a, 101a).

6. On appeal, rather than embrace the District Court's reasoning, petitioners reverted to arguments the District Court had rejected. Discarding the thesis that the databases constituted "revisions" of individual periodical issues, they reverted to their argument that the databases *contained* "revisions" of the collective works. As they had below — and as they do here — they urged the Court of Appeals to find that they had placed intact revisions or "electronic copies" of the print publishers' periodical issues in the databases.

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9 Practically speaking, this would mean that the NEXIS and GPO databases constituted "revisions" of the August 21, 1998 edition of *Scientific American*, the December 6, 1995 edition of *Nonpareil*, the November 19, 1985 edition of *Explorer*, etc.

7. Like the District Court before it, the Second Circuit rejected petitioners' contentions that the databases at issue contain collective works. It found that they contain articles. (2a, 4a, 5a). Thus, it found that "NEXIS is a database comprising thousands or millions of individually retrievable articles taken from hundreds or thousands of periodicals." (14a) It found that the NYTO CD-ROM is composed of "the full texts of articles" similarly taken from different issues of The New York Times. And, it found that the GPO CD-ROM "contains selected New York Times articles and thousands of other articles [from other journals and periodicals]" (5a) (material in brackets added). Each article that is stored in one of these databases is stored as a discrete unit, either in a text-only or page-view form.[10] As a result, articles that were once an integral and inseparable part of particular print collective works are "now available . . . [to] be retrieved individually or in combination with other pieces originally published in different editions of the [same] periodical or in different periodicals." (6a-7a).

In addition to finding that the databases didn't contain intact collective works, the Court of Appeals also found that they didn't legally *constitute* any one of the three collective works provided for in Section 201(c). In other words, although it agreed in substantial part with the District Court on the facts of the case, it disagreed with the District Court's construction of Section 201(c). (7a-14a). Finding that an amalgamation of articles is neither the original collective work in which any of the articles appeared nor a "revision" of any of those particular collective works, the Second Circuit further found that defendants had not acted within the confines of the § 201(c) privilege but had infringed plaintiffs' rights in their contributions. (6a, 9a, 14a). Accordingly, it reversed and remanded with instructions to enter judgment in plaintiffs' favor. (2a, 22a) It did so with respect to each of the three

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10 UMI uses a somewhat different methodology to incorporate articles from the N.Y. Times Sunday book-review and magazine sections onto its GPO CD-ROM than it uses to incorporate articles into NYTO. (5a). That methodology results in page-views.

electronic databases at issue in the litigation, i.e., the NEXIS on-line database and the two UMI CD-ROM's.

8. Petitioners timely moved for rehearing and/or rehearing en banc and, on February 25, 2000, the Court of Appeals issued an amended opinion in which it reiterated its findings and conclusions. Subsequently, on April 6, 2000, the entire Second Circuit denied petitioners' motion for rehearing en banc. No judges on the Circuit recorded a dissenting vote or issued a dissenting opinion.

9. Petitioners then moved for a stay of the mandate, with undersigned counsel for respondents consenting for purely pragmatic reasons.

REASONS THE PETITION SHOULD BE DENIED

Introduction

This Court does not normally grant certiorari to review questions of first impression presenting issues of statutory construction that have, to date, been resolved in only one Circuit, conflict with no decision of this Court and present no constitutional issues. It should not now.

Petitioners attempt to bypass the traditional criteria of this Court by arguing that treating them like other litigants would implicate this Court in "the massive destruction of constitutionally protected information." (Pet. at 17).

This is not a case about library burning or the destruction of information. It is a case about who, in the absence of specific agreement, should receive royalties from the electronic re-publication of contributions made by freelance writers to petitioners' periodicals. Section 201(c) of the Copyright Act of 1976 provides the answer.

It provides that, in the absence of an express transfer of the copyright in an article ("contribution") written by a freelancer, or of any rights under it, the owner of copyright in a newspaper or magazine issue ("collective work") is presumed to have acquired *only*

> "the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series."

Were the Court to grant certiorari in this matter, the case would present three questions. See "Questions Presented," *ante.* At this juncture, however, there is only one question:

Whether it is appropriate for this Court to review, prior to entry of judgment and a hearing or determination on damages, a case of first impression resolved by a routine exercise in statutory construction?

Because there has been no other decision on this issue by any Circuit, because it does not conflict with any decision of this Court, because it is a new issue that is being developed in various factual contexts in cases now pending, and because it presents no First Amendment or other constitutional issues, the answer must be, "No."

ARGUMENT

While petitioners have regularly insisted over the past six years that the Copyright Act must be given a "medium-neutral" construction, in the final analysis they are actually arguing for the exact opposite. They are asking this Court to construe the Act in such a fashion as to give them rights and privileges in the electronic medium that they do not have — and admit they do not have — in any other medium.

Thus, they admit that they cannot cut an individual article out of a newspaper and distribute it as a flyer on the street. They admit that they cannot print up an individual article and make it available at a newsstand. And, they admit that they cannot include an individual article from one newspaper or magazine in a new or different anthology or compilation.

They pretend that different rules apply, however, in the electronic medium. In other words, they pretend that they can do precisely those things that they are forbidden to do in print so long as they use electronic shears instead of regular scissors.

I. The Facts Of This Case Do Not Present Issues Either Requiring Or Meriting This Court's Attention. The Issues Petitioners Raise Are Not Posed By The Facts Of This Case.

A. Petitioners Are Not Precluded Under The Second Circuit's Decision From Publishing Their Periodicals In Electronic Form.

Petitioners labor to create the impression that the Second Circuit's Opinion draws an arbitrary and anachronistic line: It permits Petitioners to publish their newspapers and magazines in a print-on-paper form. It prohibits them from publishing those same newspaper and magazine issues in an electronic form — i.e., on-line, on-disc, or in a DVD, etc.

Nothing could be further from the truth. Absolutely nothing in the Second Circuit's opinion precludes the publisher-defendants from publishing their works in any medium they choose, including the electronic medium. What it precludes them from doing is publishing somebody *else's* works in the electronic medium without permission or compensation. In other words, it precludes them from utilizing a *format* in the electronic medium that exploits component parts of their collective works as distinct from their collective works proper.

Had the print publishers wanted to make "electronic copies" of their collective works, there is undisputed evidence that they could have done so, using particular digital scanning techniques. They did *not* create such copies — not because they couldn't technologically, but because, from an economic standpoint, they didn't want to.[11] What they wanted to create

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11 Contrary to the suggestion at page 26 of their petition, there is undisputed expert evidence in this case that petitioners were not constrained in any way, either by the characteristics of the electronic medium or by technological considerations, from making intact "electronic copies" of their collective works. See Affidavit of Glenn Williams submitted in support of Plaintiffs' Motion for Summary Judgment and In Opposition to Defendants' Motion. Petitioners chose not to make such copies — not because the technology would not permit them to, but because the market for such a product is infinitesimal compared with that for copies of individual articles.

— and did create — and subsequently offered for sale or distribution were copies of individual components of their collective works, including respondents' freelance articles.

In other words, petitioners consciously chose to make certain types of electronic works and not others. The reasons for their choices are obvious. Had petitioners made electronic copies of their collective works, they would have been exact on-line replicas of their publications — or, in essence, an electronic microfilm. Each of the component parts of an issue so replicated would have been inextricably fixed in the collective work as a whole, and could only have been retrieved together with all of the other component parts that originally appeared together with it.

Petitioners created infinitely more saleable items. They made each article that was once an integral part of a collective work available separate and apart from all of the other articles, features, and factors of selection and arrangement that gave the collective work its character. Thus, petitioners' databases offer individual contributions either on a stand-alone basis, or as part of a compilation or anthology of contributions from different issues and periodicals. What they do not in fact offer is "that particular work" in which the articles first appeared, or an "electronic copy" of it.

While someday someone may challenge petitioners' right under the Copyright Act to make exact on-line replicas of their collective works, that day has not yet come. If and when it does, that case will present the issue petitioners have asked this Court to review: i.e., whether petitioners are being denied the right to make electronic copies of their collective works. *This* case does not present that issue. It simply asks whether three specific databases — works that the Courts below found were not "electronic copies" of the print publishers' original collective works[12] and *did* exploit individual freelance contributions — are outside the § 201(c) privilege. They clearly are.

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12 Given this fact, petitioners' "Question Presented" is irrelevant to this case.

B. The Decision Is Unlikely To Have The Impact Petitioners Suggest It Will Have.

1. The Decision Simply Establishes A Default Rule That Is Applicable In The Event That The Parties Do Not Address The Question Of Rights.

In addition to misrepresenting the issues raised by this case, petitioners have exaggerated its impact.

They suggest that the decision the Court is being asked to review affects *everything* in their databases and requires them to be destroyed or shut down. Those claims are hyperbolic.

First of all, the issue of remedies has not yet even been reached in this case, let alone in any case presenting *Tasini*-type issues.

Even more significantly, the great majority of articles in the NEXIS database are not freelance articles. They were written either on a "work-for-hire" basis or by a newspaper or magazine's staff. (Pet. at 13; 61a). The Second Circuit's decision, therefore, has no application to them.

Indeed, accepting the accuracy of petitioners' own figures for purposes of this brief, freelance articles account for only .0036% or 3.6/1,000ths of *one* percent of the material in NEXIS' database. (The database currently contains 2.8 billion articles. See http://www.lexis-nexis.com/business/about.htm (visited Sept. 28, 2000). According to petitioners, approximately 100,000 of those are freelance articles. See Pet. at 13.)

Equally important, many of those 100,000 articles were written *pursuant to an express transfer of rights* in which the publisher was given either "first North American serial rights," "first publication rights" or "the right first to publish the Story in the Magazine," etc. [13] It is only articles that have *not* been

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13 Originally, the *Tasini* case involved four types of claims. Each was predicated upon a different arrangement between the publisher and the freelancer. In two of the sets of claims, there was an express agreement between the publisher and the freelancer, and the agreement contained an

written pursuant to an express transfer of rights, however, that are at issue in the present petition. In other words, only those articles to which the "default rule" provided for in Section 201(c) applies. That sub-universe of articles, however, probably constitutes at most .001 % — or one thousandth of one percent — of the material in NEXIS.

For that reason, petitioners' assertions that the Second Circuit's decision will necessitate the deletion of millions of articles are extremely inflated. See, e.g., Pet. at 16.

As the Second Circuit observed in its Opinion: We are talking about a default rule that only applies in the absence of an express transfer of rights. "Publishers and authors are free to contract around the statutory framework." (17a).[14]

In any event, there is an alternative to deletion: reasonable compensation to authors whose works have been used.

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express transfer of rights. (Under the first of these, the plaintiff gave the publisher 'first North American serial rights' in his article. Under the second, the plaintiff gave the publisher 'first publication' rights.)

In a third set of claims, Newsday claimed the right to include plaintiffs' articles in the NEXIS database pursuant to a legend stamped on the back of its checks. The legend purported to retroactively give the newspaper publisher the right to include plaintiff's articles in its own "electronic archives." Finally, in the fourth set of claims, both parties agreed that there was no agreement or express transfer of any rights.

Since respondents believed that freelancers were as likely to find themselves writing pursuant to the first and/or second type of arrangement, as they were the fourth, they sued on the basis of all four arrangements.

Only the fourth set of claims is pertinent to this petition. (Petitioners did not appeal rulings in plaintiffs' favor on the second and third set of claims. The first claim was settled.)

14 Many of them already have. See, e.g., reference by the Second Circuit to the New York Times' new policy. (3a, n.1)

2. Contrary To Petitioners' Contention, Further Percolation Is Not Only Possible, But Appropriate.

Petitioners advance several arguments at pages 10-18 of their brief as to why the normal rules regarding Circuit conflicts should not apply in this case. They claim that: (1) this Court has affirmatively dispensed with the requirement of a Circuit conflict in copyright cases and adopted a more relaxed standard for review, see Pet. at 10; (2) given the number of publishers in New York and the international reach of databases, a decision of the Second Circuit on a copyright issue "sets an immediate national rule *not* subject to further percolation in the courts of appeals," Pet. at 12 (emphasis added); (3) this Court — ipso facto — should consider such a decision ripe for review; and (4) if it doesn't and certiorari isn't granted, petitioners and much of the rest of the publishing world will suffer *irreparable injury*. See Pet. at iii, 9, and 12 (Petitioners use the terms "irreparable harm," "irreparable injury" and "irreversible, nationwide harm" interchangeably).

None of petitioners' arguments is tenable. *First,* there is simply no evidence that the Court has adopted a special or more relaxed standard for review in copyright cases. In fact, the cases petitioners cite in footnote 5 on page 10 of their brief in support of that proposition establish the opposite. Thus, in four out of the five cases in which petitioners suggest the Court dispensed with the requirement of a "split" and employed a more lenient standard, a "direct circuit conflict" was clearly evident.[15] See, e.g., *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994)(there was a conflict between the Sixth and Second Circuits on the one hand and Ninth Circuit on the other); *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991)(there was a conflict between the Second, Fifth, Ninth and Eleventh Circuits on the one hand and Tenth Circuit on the other); *Harper & Row v. Nation Enterprises*,

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15 While not immediately apparent from the face of the decisions, even a cursory examination of the underlying petitions demonstrates this to be true.

471 U.S. 539 (1985)(there was a conflict between the Seventh and Fifth Circuits on the one hand and Second Circuit on the other); *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984)(there was a conflict between the Ninth Circuit and the Court of Claims).

Second, the suggestion that the Second Circuit has an effective monopoly or is the sole effective law-giver in the copyright field is inaccurate. The Second Circuit's acknowledged expertise aside, copyright issues have arisen in and been addressed by *every* Circuit in the country. Even a cursory examination of recent copyright decisions confirms this to be true. *See, e.g., Segrets, Inc. v. Gillman Knitwear Co., Inc.*, 207 F.3d 56 (1st Cir. 2000), *petition for cert. filed*, Jun.26, 2000; *Smithkline Beecham Consumer Healthcare, L.P. v. Watson Pharm., Inc.*, 211 F.3d 21 (2d Cir. 2000); *Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377 (3d Cir. 1999), *petition for cert. denied*, 2000 U.S. LEXIS 1869 (Mar. 6, 2000) (No. 99-866); *Ale House Management, Inc. v. Raleigh Ale House, Inc.*, 205 F.3d 137 (4th Cir. 2000); *Brown v. Ames*, 201 F.3d 654 (5th Cir. 2000), *petition for cert. filed*, Jun. 21, 2000; *Landham v. Lewis Galoob Toys, Inc.*, No. 99-5959, 2000 U.S. App LEXIS 23386 (6th Cir. Sept. 18, 2000); *Kennedy v. Nat'l Juvenile Detention Ass'n*, 187 F.3d 690 (7th Cir. 1999), *petition for cert. denied*, 120 S. Ct. 1169 (Feb. 22, 2000); *Phillips Beverage Co. v. Belvedere, S.A.*, 204 F.3d 805 (8th Cir. 2000); *Worldwide Church of God v. Philadelphia Church of God, Inc.*, Nos. 99-55850, 99-55934, 99-56005, 99-56489, 2000 U.S. App. LEXIS 23390 (9th Cir. Sept. 18, 2000); *Oklahoma Natural Gas Co. v. Larue*, Nos. 97-6087, 97-6093, 97-6224, 1998 U.S. App. LEXIS 21394 (10th Cir. Sept. 1, 1998), *petition for cert. denied*, May 16, 2000; *Brewer-Giorgio v. Producers Video, Inc.* 216 F.3d 1281 (11th Cir. 2000); *Recording Indus. Ass'n of Am., v. Librarian of Congress*, 176 F.3d 528 (D.C. Cir. 1999); *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322 (Fed. Cir. 2000), *petition for cert. filed*, Jul. 11, 2000.

In any event, the suggestion that because many publishers are located in New York, there is little opportunity for and

virtually no possibility of effective percolation elsewhere is mistaken.[16] The facts are clearly to the contrary. There are media, publishing and entertainment companies located throughout the country — as well as overseas — and copyright lawsuits have arisen with respect to many of them. Petitioners' own citations prove this.[17]

Even more significantly, perhaps, the potential plaintiffs on these issues — i.e., the freelancers whose copyrights have been infringed in this instance — are also located throughout the country. Under the jurisdictional provision that was specially adopted for copyright cases — and that petitioners concede is "expansive," Pet. at 12 — these plaintiffs can bring suit not only in the particular district in which a defendant "resides," but also wherever the "defendant *or his agent* . . . may be found." 28 U.S.C. § 1400(a)(emphasis added).

Such plaintiffs not only can sue, but have sued. There are now at least six actions involving *Tasini*-type claims in district courts around the country or on appeal from those courts: in the Southern District of Florida, Central and Northern Districts of California, District of Delaware and Southern District of New York.[18]

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16 Petitioners pretend that it is unusual for the decision of a single court to have nationwide ramifications. (Pet. at 11, 12, 17, 18). It is not unusual at all. Nowadays, it is probably the rule rather than the exception. This is so whether a suit sounds in products liability law, antitrust law, employment discrimination, defamation, RICO, etc. The reason is both obvious and simple: most companies have a national business.

17 Thus, of the five copyright cases that petitioners make the cornerstone of their argument, three originated outside the Second Circuit: *Campbell v. Acuff-Rose* (the Sixth Circuit), *Sony Corp. v. Universal City Studios* (the Ninth Circuit), and *Feist Publications, Inc. v. Rural Tel. Serv. Co.* (the Tenth Circuit).

Of the eleven copyright cases petitioners cite to at pages 23-25 of their brief, all eleven hale from other Circuits.

18 Three of these are class actions against databases for having infringed freelancers' rights: *Laney v. Dow Jones & Company, Inc.*, Civil Action No. 00 769 (United States District Court for the District of Delaware); *Posner v. Gale Group, Inc.*, Civil Action No. 00 2913 (United States

Even if this were unusual and, generally, there were a disproportionate number of copyright cases in the Second Circuit, to the best of respondents' knowledge, the Supreme Court has never found that the criteria and standards for granting certiorari *should be relaxed simply because certain issues* may arise more frequently in one Circuit than in another for reasons of geography. For instance, it is clearly the case that certain issues relating to illegal re-entry in the immigration context arise more frequently in the Ninth and Fifth Circuits than in other Circuits. Nevertheless, no one has ever suggested that parties involved in cases presenting such issues in those Circuits have the right to bypass the normal rules for certiorari. The evidence is to the contrary. *See, e.g., Almendarez-Torres v. United States,* 523 U.S. 224 (1998)(the Court granted certiorari only after nine Circuits had addressed the issue being presented to it and there was an 8 to 1 split); *United States v. Munoz-Flores,* 495 U.S. 385 (1990)(the Court granted certiorari only after 7 Circuits had addressed the issue being presented to it and there was a 6 to 1 split); *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976)(the Court granted certiorari only after 2 Circuits had addressed the issue and there was a 1 to 1 split); *United States v. Peltier*, 422 U.S. 531 (1975) (same); *INS v. Errico*, 385 U.S. 214 (1966) (same).

District Court for the Northern District of California); and *The Authors Guild, Inc. v. The Dialog Corporation*, Civil Action No. 00 6049 (United States District Court for the Southern District of New York). They are currently the subject of a pending motion before the Judicial Panel on Multidistrict Litigation for transfer and coordination or consolidation under 28 U.S.C. § 1407. The undersigned counsel for respondents is also plaintiffs' counsel in the *Laney* case.

The fourth case is the *Tasini* case, and the fifth and sixth cases are cases, not by writers, but by photographers complaining of the electronic reproduction of their works. One of these, *Greenberg v. National Geographic Soc'y*, No. 97-3924 Civ, 1998 U.S.Dist. LEXIS 18060 (S.D.Fla. May 14, 1998), is currently on appeal before the Eleventh Circuit.

The motion before the Judicial Panel on Multidistrict Litigation notes that *Tasini* is a related case but does not seek its transfer, coordination, or consolidation, as *Tasini* is not under a district court's jurisdiction at this time.

There is thus no reason to adopt a relaxed standard in this case for granting certiorari since there will be ample opportunity for these claims to percolate up through the Circuits. Respondents are confident that no split will develop — not because the Second Circuit will be the only Circuit to rule on the issue, but because other Circuits will adopt its reasoning.

Third, petitioners' complaint that even if percolation takes place, the coffee will be brewed too late — because petitioners, publishers and information-aggregators will have already suffered "irreparable injury" — is not a complaint that is appropriately made to this Court. This is so for two reasons: First, because irreparable injury to the parties to a suit is not the basis upon which certiorari is granted or denied. It is granted or denied based upon the rules petitioners have been trying to avoid. Second, because the irreparable injury petitioners say they will suffer is *at their own hands*. (See Pet. at 17, where petitioners state: "[T]his is a case in which the necessarily risk-averse position of petitioners . . . leaves no choice other than to take irreversible, information-destroying steps when the Second Circuit's judgment takes effect.")

Clearly, if irreparable injury to a party could be a basis for granting certiorari and the injury could be self-inflicted, then companies could manufacture claims of irreparable injury and assure themselves review in the United States Supreme Court. This is a formula the Court should not countenance because it will result in "certiorari on demand."

3. Unless Petitioners Are Determined To Carry Out Their Doomsday Threats, They Are Unlikely To Come To Pass.

Although they purport to be arguing that the Court has adopted a less stringent standard for certiorari in copyright cases than it has in other cases, what petitioners are really arguing for is a kind of "most favored industry" status. That is, a preferred position with respect to certiorari because their industry trades in information.

Not convinced that the Court will ever agree that they are automatically entitled to an extraordinary status, however, or

that copyright cases necessarily warrant a relaxed standard of review, petitioners try another tack: THREATS.

In order to maximize the impact of these threats, petitioners first don the garb of the custodians of the nation's history and the compilers and overseers of what they call its "historical archive."[19] After claiming this exalted status, they then threaten to destroy what they just claimed to have wrought. In other words, they threaten that they will take "irreversible, information-destroying steps" to destroy "decades' worth of articles." (Pet. at 17, 9). They threaten that they will "delete vast numbers of . . . articles permanently from the NEXIS database and . . . destroy large numbers of CD-ROMs." (Pet. at 9, 15). And, they threaten that they will effectively cut a swathe through the so-called 'historical record' to eliminate any freelance presence. (Pet. at 13-14, 16).[20]

In essence, petitioners are suggesting this Court is responsible for the fate of billions of bits and bytes petitioners have taken hostage. Unless you give us what we want, they argue, we are going to begin destroying documents and discs on a massive scale, and permanently erasing articles from our

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19 If they are in fact doing as they suggest at pages 13 and 14 of their brief, and increasingly storing historical documents electronically, petitioners may be consigning a not insignificant portion of the nation's history to ultimate oblivion. Compare "Compact Disks: Life Expectancy vs. Expectations," N.Y. Times, Feb. 23, 1992 (Letter-to-the-Editor) and Michael Riggs, "The Compact Disk Is Here To Stay . . . for a While," N.Y. Times, January 19, 1992, for a discussion of the fragility of the medium in the context of music CD's.

20 Petitioners' claims that massive amounts of information will have to be destroyed and CD-ROMs withdrawn from the market rest on a series of affidavits petitioners submitted in support of a motion that undersigned counsel did not oppose — i.e., petitioners' request for a stay of the mandate. (Pet. at 15, n. 8)

They characterize these affidavits as "sworn and uncontradicted testimony." (Pet. at 15) It would have been more accurate to characterize them as statements in the nature of hearsay, submitted as proffers on a peripheral issue that was not contested. (See Statement of the Case, ¶ 9.) While the statements in the affidavits may have been sworn to by petitioners' officers, they were obviously never subjected to cross-examination.

databases that do not have an undisputed "work for hire" provenance.[21]

And, what is it that the petitioners want? What are their demands? Nothing less than: (i) a preferred position for review of decisions adverse to publishers, and (ii) a grant of certiorari in this case.

The drastic remedy petitioners threaten to implement — deleting articles from their databases — is entirely self-imposed. No court has ever ordered any of the petitioners to delete a single article from a single database. No court has yet even considered such a remedy. Indeed, the parties in *Tasini* haven't even gotten to the phase of the case in which any remedy has been considered.

Even if this Court were to give petitioners exactly what they wanted — that is, if it granted certiorari and undertook to review the 201(c) issues in their entirety — petitioners would still have to identify, locate and bargain with free-lancers whose works they have appropriated.

Why? Because the number of articles in the database that were written pursuant to the default rule is only a small

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21 All the petitioners' talk of having to permanently erase articles from a database is misleading. (*See, e.g.*, Pet. at 13, 15, 17) Contrary to petitioners' suggestion, one can easily and instantaneously remove works from a database or bulletin board or *restore* works to a database. Both things were done in connection with this case. *See* Affidavit of H. Bruce Franklin submitted in support of Plaintiffs' Summary Judgment Motion.

Petitioners' talk of having to "destroy" CD-ROMs or "permanently withdraw" them from the market is equally misleading. (*See, e.g.*, Pet. at 13, 15). CD-ROMs are routinely replaced at periodic intervals in the ordinary course of business. The old CD-ROMs are simply superseded by new ones and become obsolete.

Given this practice, there is no reason why new CD-ROMs couldn't be created without infringing material and used as replacement discs. Recipients could then be instructed to follow the procedure they would normally follow upon the receipt of a new disc — i.e., to discard the one that was, in any event, being superseded. Under these circumstances, it seems likely that *no* CD-ROMS would need to be "withdrawn" or "destroyed."

percentage of articles in the database that were written by freelancers. Petitioners also appropriated the work of freelancers who wrote pursuant to "first North American serial rights" clauses, pursuant to "first publication rights" clauses, and pursuant to legends that were stamped on the backs of checks. These appropriations were also found to have been violative of freelance authors' rights under the Copyright Act, and yet *petitioners did not appeal these rulings*. (See fnote 15, *supra*.) It follows that whatever this Court may or may not do with respect to the 201(c) aspect of the Second Circuit's ruling, at some point petitioners will have to proceed to identify, locate and obtain permission from freelancers who wrote under those other circumstances.

So, what is the point? If the threatened dire consequences of the decision below are self-imposed and granting review will leave petitioners with the onerous tasks they say they are trying to avoid, what is the purpose of their making the dire prognostications in the first place? Could it be that they are really trying to save themselves from another fate and achieve a very different objective? That they are not really so concerned about what they may have to pay for past deeds as they are about getting control for the future? That they believe that if they can only convince this Court of the correctness of *their* interpretation of § 201(c), then they would forever after be able to rely on the default rule and never again have to negotiate with freelancers?[22]

That would ensure them not only "all rights" in all future articles forevermore, but also, practically speaking, the exclusive right to the royalty stream from those articles. And the sooner this stream starts, the longer it flows. In other words, it would ensure them greater control and an even sweeter deal than they had under the "doctrine of indivisibility" prior to the enactment of the 1976 Copyright Act.[23]

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22 Obviously, the decision of the Second Circuit would have the opposite effect: i.e., of encouraging all parties to enter into freelance agreements.

23 Ironically, both the petitioners and District Court have agreed that Congress enacted the 1976 Copyright Act and Section 201(c), in large part, to overturn the doctrine of indivisibility. (49a, 72a; Pet. at 6)

Under the doctrine of indivisibility, a publisher got all rights in an article if it negotiated a contract that gave it any rights at all.[24] Here, the publishers are trying to establish a rule that will automatically give them all rights in all articles without any contracts at all. In other words, they are looking to convert § 201(c) into the exception-swallowing "cash cow."

While it may well be appropriate to grant publishers "most favored industry" status when the issues before the Court pertain to the First Amendment — because there the media stands in the shoes of the public and champions their rights — it would be inappropriate to grant them such a status under the circumstances of this case. Here, far from seeking to advance First Amendment values, petitioners are seeking to protect and expand their bottom line. Indeed, even the Court that ruled in petitioners' favor on the Section 201(c) issues had no illusions about what petitioners were seeking to protect: a "windfall." (79a).

While petitioners have every right to be interested in their bottom line, that right is not protected by the First Amendment and is entitled to no special consideration from this Court.

II. There Is No Conflict Between The Circuits Or With The Decisions Of This Court.

A. There Is No Conflict Between The Circuits On This Issue.

There is no conflict between the Circuits. This is an issue of first impression that has not yet been addressed by any other Court of Appeals.

B. The Alleged Conflict With *Sony* Is An Illusory One.

At pages 22-26 of their brief, petitioners suggest that the Second Circuit's decision in this case is in conflict with this

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24 The rights in an article were considered to be "indivisible." So that if a publisher were given any, it was deemed to have gotten them all. See 3 M. & D. Nimmer, Nimmer on Copyright, § 10.01[A], at 10-5 (1996 ed).

Court's decision in *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

Petitioners are mistaken. The two decisions are compatible. *Sony* is simply inapposite.

In *Sony*, Universal City Studios Inc. and Walt Disney Productions sued the manufacturer and retailers of Betamax video tape-recorders (VTR's) for infringing copyrights they held in a variety of TV programs. They alleged that some individuals had used the VTR's to record their programs off the airwaves without authorization and in violation of their rights. They sought to hold the VTR manufacturer and retailers liable for the consumers' infringement on the theory that they had contributed to that infringement by providing them with the means to accomplish it. This Court held that defendants were not liable under the Copyright Act for having sold the VTR's since the VTR's were simply a "staple article of commerce" that could be used in both infringing and non-infringing ways.

The instant case does not involve the sale and distribution of a "staple article of commerce." It involves the reproduction, sale and distribution *of the infringing works themselves*.

As the Court clearly recognized in *Sony* itself, this distinction is a critical one. It highlighted the distinction in the context of explaining why its earlier decision in *Kalem Co. v. Harper Brothers*, 222 U.S. 55 (1911), was irrelevant to the issues then before it. It said:

> Respondents [Universal City Studios and Walt Disney Productions] argue that *Kalem* stands for the proposition that supplying the "means" to accomplish an infringing activity and encouraging that activity through advertisement are sufficient to establish liability for copyright infringement. This argument rests on a gross generalization that cannot withstand scrutiny. The [film] producer in *Kalem* did not merely provide the "means" to accomplish an infringing activity; the producer supplied the work itself, albeit in a new medium of expression. Sony in the instant case does not supply Betamax consumers with respondents' works; respondents do. Sony supplies

> a piece of equipment that is generally capable of copying the entire range of programs that may be televised: those that are uncopyrighted, those that are copyrighted but may be copied without objection from the copyright holder, and those that the copyright holder would prefer not to have copied. . . .

Sony, supra, 464 U.S. at 436.

For the same reasons the *Kalem* decision was not relevant in *Sony*, the *Sony* decision is not relevant here: *Tasini*, like *Kalem*, involves the defendants' reproduction and sale of the infringing works themselves. *Sony* only concerned sale of the "means."[25]

There is a second reason why the two decisions are not in conflict. In *Sony*, the claim was that Sony and the other petitioners were liable for acts of copyright infringement *allegedly committed by third parties* — i.e., the Betamax consumers.

Here, there are no such claims. As petitioners have readily admitted, see Pet. at 4, respondents have complained of *petitioners'* conduct and not the conduct of third parties.[26] Thus,

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25 The District Court clearly recognized that *Sony* is not applicable here. *See* 33a, n.3.

26 Indeed, the only ones who have consistently raised the conduct of third parties in this case are petitioners, who have repeatedly insisted that it affords them a defense.

Thus, while acknowledging that the component parts of what was formerly a "collective work" are dispersed throughout a database, petitioners have repeatedly relied upon the fact that, *if he chose to*, an end-user could intentionally conduct a search that would *re*collect some of its parts. Thus do petitioners support the claim that a version of the collective work is still 'carried' in the database. See Letter-Memorandum From Bruce P. Keller to the Court, dated December 24, 1996, submitted in further support of the defendants' motion for summary judgment.

It is only in their petition to this Court that petitioners have finally acknowledged that that defense is not a good one. See Pet. at 24-25, where petitioners cite to the decisions in *Los Angeles News Serv. v. Tullo*, 973 F.2d 791, 797 (9th Cir. 1992) and *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381, 1389 (6th Cir. 1999)(en banc).

the only defendants are the print publishers and database producers — not end-users or consumers — and the liability of the defendants is predicated on their *own* infringing acts.

In the final analysis, petitioners' real complaint is not that respondents relied upon third-party conduct and that the decision is in conflict with *Sony*, but that respondents didn't rely upon third-party conduct and that the decisions are not in conflict. 'If respondents had only pressed a different case,' petitioners grumble, 'we might have had a defense.'[27]

C. The Alleged Conflict With *Feist* Is, Likewise, Illusory.

At pages 26-28 of their brief, petitioners repeat the by now timeworn fiction that all they have done is "mechanically reproduce" entire issues of their newspapers and magazines — i.e., their collective works — in another medium.

Not so. They are mechanically reproducing component parts of their collective works — i.e., articles, op-ed pieces and other pieces of text — but not the collective works proper. Significantly, for purposes of this litigation, those parts include articles in which respondents hold the copyrights.

In addition to refusing to acknowledge the fact that they are reproducing only components, petitioners refuse to acknowledge two further facts. First, that the components are then provided to a database producer for the express purpose of being included in a database. Second, by combining thousands, millions or billions of articles from tens of thousands of different sources, the database producers create anthologies that never existed before. These anthologies are themselves copyrightable and qualify as new works.[28] However,

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27 *Sony* would not have been applicable, in any event, even if respondents *had* sued end-users — once again, for the reasons articulated in *Kalem*.

28 See 37 C.F.R. 202.3(b)(4)(recognizing that automated databases constitute copyrightable works and providing for their registration). See also Copyright Office Circular 65, Copyright Registration for Automated Databases.

they do not qualify as one of the § 201(c) works in which freelance contributions may be included. H.R. Rep. No. 94-1476, at 122-23 (1976), reprinted in 1976 U.S.C.A.A.N. 5659, 5738 (under § 201(c), freelance contributions cannot be included "in a new anthology, an entirely different magazine or other collective work . . . ").

Cognizant of the fact that it follows inexorably that petitioners have infringed respondents' copyrights, petitioners try one last desperate salvo. They suggest, sotto voce, that their databases lack sufficient originality to be registered and, therefore, *cannot* constitute "new works."[29] They appear to believe that if they convince the Court that they *do not* constitute "new works," the Court will then be left with no alternative but to conclude that the database must either constitute the "old work" or a "revision" of that work — in other words, one of the two works in which freelance contributions can be included under § 201(c)'s first clauses. However, because "new" and "old" are not the only alternatives, petitioners' efforts are beside the point.

The choice isn't simply between a "new work," on the one hand, and something that is either the original or a "revision" of the original on the other. There is still a third option. Imagine you are at an auto junkyard. Before you, lying on the ground are used parts from dozens of old cars. No one would say that these constitute a new car — but who would suggest that the old cars still exist, either in their original form or in a

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29 It should be noted, of course, that *Feist* didn't concern databases. It concerned the copyrightabililty or noncopyrightability of two compilations of facts, containing names and telephone numbers in alphabetical order. Thus, the Court's conclusion that the white pages of the telephone directory weren't sufficiently original to qualify as copyrightable subject matter is of no relevance here.

In any event, the issue in *Tasini* isn't whether petitioners' databases possess sufficient originality to be eligible for copyright registration, but whether petitioners can reproduce and publish respondents' articles — which everyone acknowledges are copyrightable — as part of those compilations. The Second Circuit concluded that petitioners cannot. That conclusion is not in any way incompatible with *Feist*.

revised, revamped or souped-up version of the original? In fact, there are no more cars — just spare parts.

In either event, whether you consider a database of the type at issue here a "new work," as respondents believe you must, or a noncopyrightable collection, as petitioners suggest would be proper under *Feist*, it clearly does not qualify as one of the three permitted works within the scope of § 201 (c). There is absolutely no conflict between *Feist* and *Tasini*, therefore, or between the principles underlying *Feist* and the conclusion that petitioners infringed respondents' copyrights.

III. There Can Be No Doubt About The Correctness Of The Second Circuit's Decision

A. The Provision At Issue

At page 7 of their Petition, petitioners chide the Second Circuit "for its inclusion of only one citation to a copyright law decision" in its Opinion. It is petitioners who deserve to be chided. As the issue raised is one of first impression, it is unlikely there will be any "copyright law decision" directly on point.[30] Even more important, as the issue raised is whether the privilege afforded by § 201(c) extends to petitioners' activities, it can only be answered by careful examination of the language of that provision. Petitioners shun all consideration of the words of the statute, relegating it to the far reaches of their Appendix, and offer this Court no explanation of why the Circuit's reading of its plain meaning was in error. Even a cursory examination of those words reveals why petitioners are so allergic to them.

The statutory provision in question has three clauses. It provides that, in the absence of an express transfer of any rights in a freelance article, the publisher of the collective work to which the article has been contributed is presumed to have acquired a privilege of reproducing and distributing the article only in one of the following ways: as part of

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30 For copyright cases *generally* supporting respondents' position, petitioners have to search no further than their own brief. *See* Pet. at 23-24.

(1) "that particular collective work",
(2) "any revision of that collective work," and
(3) "any later collective work in the same series."

17 U.S.C. § 201(c)(emphasis added).

Where a legal question is governed by an express provision of a statute and that provision has a plain, obvious and unmistakable meaning, it is the words of the statute that govern and not case law or general principles. *Damarest v. Manspeaker*, 498 U.S. 184 (1991); *Estate of Cowan v. Nickols Drilling Co.*, 505 U.S. 469 (1992); *Metropolitan Stevedore v. Rambo*, 515 U.S. 291 (1995); *Landreth Timber Co. v. Landreth*, 471 U.S. 681 (1985). The Second Circuit had no trouble understanding the plain meaning of this section.

It explained: "The first clause sets the floor, so to speak, of the presumptive privilege . . .". "The second clause expands on this . . ." "Finally, the third clause sets the outer limit or ceiling on what the Publisher may do . . ." (10a).

Petitioners, however, unable to stand on the floor, and discontented with the "outer limit or ceiling," shoot for the stars. Alluding to their self-appointed status as guardians of the national archives and the devastating consequences they claim for their self-imposed remedy, they argue that the stars can be found *between* the statute's floor and its ceiling. Their interpretation does violence to the language of the statute. Their policy arguments should be aimed not at this Court, but at Congress.

The statute fixes the "outer limit" of the republication rights of the owner of copyright in a collective work at "a later collective work in the same series." Congress added the third clause of § 201(c) to make it absolutely and unmistakably clear that the author of the collective work to which a freelance article is contributed cannot include that contribution "'in a new anthology or an entirely different magazine or other collective work,' i.e., in later collective works *not* in the same series. H.R. Rep. No. 94-1476, at 122-23 (1976),

reprinted in 1976 U.S.C.A.A.N. 5659, 5738." (11a)(emphasis added).[31]

To interpret the second clause of § 201(c)("any revision of *that* collective work"), as petitioners attempt to do — as being so broad that it encompasses electronic databases containing billions of articles from hundreds of thousands of different magazine and newspaper issues — would require the interpreter to read *"that"* collective work to mean *"numerous"* collective works or *"any and all"* collective works. Such an interpretation, in addition to defying the English language, would render the third clause of § 201(c) superfluous, and the limitation it enforces, meaningless.

B. The Statute As A Whole

In the final analysis, the construction that the Second Circuit has given § 201(c) is not only its plain meaning, but also its only possible meaning. The outcome-determinative construction that petitioners are urging upon the Court would give them far-reaching rights in the electronic medium that they cannot claim and have never dared to claim in print — i.e., the right to take scissors to their publications so that they can peddle copies of individual clippings at their newsstand. It would, consequently, conflict with the concept of 'media neutrality' and be irreconcilable with what petitioners have conceded is the intention of the statute as a whole. Pet. at 6 ("Congress enacted Section 201 (c) principally to overturn those decisions under the predecessor Copyright Act of 1909 holding that publishers could exploit freelance authors' contributions *apart* from the rest of the collective work.") (emphasis in the original).

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31 As the District Court recognized, this meant that "[t]he New York Times, for instance, cannot sell a freelance article to be included in *Sports Illustrated*." (77a).

CONCLUSION

Purporting to champion media neutrality, petitioners ask this Court to license their electronic shears and newsstand to sell respondent's articles as stand-alone works, or as part of user-defined anthologies. Arguing that the new technologies make them de facto curators of the national archives, they threaten to raze them if the Court does not issue the license. They point to a heap of used car parts and argue that they are, in fact, revised Mercedes Benzes.

They stand, as they must, on a provision of a statute enacted by Congress which they disdain to discuss. They imply that should the Court peek at the statute, it will find that restrictive words like "that" and "that particular" and "same series" mean "any" and "all" and "something like." They urge the Court to stand with them, gazing at the stars, and to pretend that Polaris can be found somewhere between the floor and the ceiling. In this case, it lies in 17 U.S.C. § 201(c), and the principle that courts must interpret the law consistent with its plain language.

Petitioners' insistence that they are entitled to be exempted from virtually all the relevant norms — from those that govern statutory construction to those that govern the exercise of this Court's powers of discretionary review — must be rejected. They do not come before the Court in this case as the representatives of a powerless or oppressed minority nor, indeed, to defend against encroachments on the First Amendment, but as merchants seeking to legitimize and perpetuate a windfall. They have presented no reason why they should not be bound by the same norms and procedures that are applied to other, similar litigants who must await entry of judgment, hearing on damages, direct appeal and the development of a body of law in various Circuits before seeking review by this Court. The sky will not fall if they do.

For the reasons stated, respondents Garson and Robbins respectfully submit that certiorari should be denied.

Dated: October 2, 2000
New York, New York

Respectfully submitted,

EMILY MARUJA BASS, ESQ.
Counsel of Record for
Respondents Barbara Garson
and Sonia Jaffe Robbins
GAYNOR & BASS
535 Fifth Avenue, 23rd Floor
New York, N.Y. 10017
(212) 953-4300

Also on the Brief:
LINDA A. BACKIEL
MICHAEL J. GAYNOR
JOANNA KYD